IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.
Income Tax Appeal No.788 of 2004

Novartis AG Basle, A Company. .. Appellant
v/s.
The Addl. Commissioner of
Income-tax. .. .. Respondent

Mr.J.D. Mistri with Mr.Damodhar i/by M/s.Kanga & Co. for appellant.

Mr.Shiv Motariya for respondent.

CORAM : H.L. GOKHALE &
J.P. DEVADHAR, JJ.

DATED : 19th September 2006

P.C. :

1. Heard the learned Counsel for the parties.

2. The appellant herein is a Company registered under the laws of Switzerland. The appellant had held some 40,50,000 shares of Indian Company named Clariant (India) Limited. During the Assessment Year 1998-1999, it transferred this entire lot of shares and claimed the capital loss of Rs.43,29,28,296/-. This claim of the appellant has been disallowed. The matter was carried upto the Income-tax Appellate Tribunal which dismissed the Appeal filed by the appellant by its judgment and order dated 15th April 2004. This has been done on the ground that according to the Revenue the appellant was not entitled to indexation under

Section 48 of the Income-tax Act, 1961 ("the said Act" for short) and, therefore, was not eligible to rely on Section 55(2)(b)(i) of the said Act. For not paying the advance tax in time as claimed by the Department, penal interest has been levied and that has been upheld by relying upon the two judgments of the Apex Court in **CIT vs. Hindusthan Bulk Carriers reported in 259 ITR 449** and in case of **M.H. Ghaswala reported in 252 ITR 1**.

3. Mr.Mistri, learned Counsel appearing for the appellant, has taken us through the judgment of the Tribunal. As far as the penal interest is concerned, he points out that there is no discussion at all as to how the penal interest would become payable and the reliance on the judgment in Ghaswala's case (supra) is totally misplaced. As far as the reliance on Section 48 is concerned, he points out that indexation has been provided, principally as a method of finding out what will be the cost of acquisition for Indian buyers as a sort of yardstick which would not be applicable in the case of non-resident Companies.

4. Mr.Motaria appearing for the Revenue tried to defend the order. However, as far as the submission on penal interest is concerned, it is

quite clear from the judgment of the Tribunal that there is no discussion as to how it was justified. Even for the non-grant of the benefit under Section 55 of the said Act, there is no discussion on merit. The claim is rejected only on the ground that Section 48 was not available to the non-resident appellant.

5. The appellant has, therefore, raised the following three questions in this Appeal which involve substantial questions of law:-

> (i) Whether on the facts and in the circumstances of the case the Tribunal erred in holding that the assessee was not entitled to exercise the option under section 55(2)(b)(i) of the Act to adopt the fair market value of shares as on 1.4.81 as the cost of acquisition of such shares when computing the capital gain/loss arising on the transfer of the said shares?
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> (ii) Whether the Tribunal erred in holding that the first proviso to section 48 of the Act was charging section and therefore erred in holding that section 55(2)(b)(i)

of the Act was not available to the assessee being a non-resident?

(iii) Whether the Tribunal erred in holding the levy of interest under section 234B of the Act without appreciating that in cases where tax is deductible at source there is no liability to pay advance tax and hence there can be no liability to pay interest under section 234B which is leviable only in the cases of default of payment of advance tax?

6. As far as questions (i) and (ii) are concerned, we expect the Tribunal to decide the liability of the appellant independent of Section 48 of the Income-tax Act. Similarly as far as the penal interest is concerned, the Tribunal is expected to discuss as to how there was delay in not paying the advance tax in time and if so, whether penal interest could be charged on to the appellant. Inasmuch as there is no appropriate discussion on both these aspects, we allow this Appeal, set aside the order dated 15th April 2004 passed by the Income-tax Appellate Tribunal, Mumbai and revive the Appeal to the file of the Tribunal for determination on both these aspects.

7. Independent of what is stated above, we do not express any opinion on the merits of the controversy and submissions of both the parties will be available to them when the matter is decided by the Tribunal.

8. Appeal is allowed in the aforesaid terms. No order as to costs.

(H.L. GOKHALE, J.)

(J.P. DEVADHAR, J.)